

## The answer to trial publicity is a better question

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### ABSTRACT

Free-Press/Fair-Trial contests now happen in a new media age. Judicial remedies such as change-of-venue, sequestration, jury admonitions, and gag orders were fashioned in an era that included broadcast radio and television, an emerging cable television industry, and the traditional print media of newspapers and magazines. That content was, to some degree, geographically bound and temporary. Now those judicial remedies are applied in a new media age that extends the reach of traditional media in time and space while offering interactive capability. The efficacy of these remedies is in question. This paper provides an historical overview of how judicial remedies for pre-trial and trial publicity have developed along with the media industries that provide such publicity. A case study will provide insight into a recent Free Press-Fair Trial contest in which traditional judicial remedies were sought. Finally, the results of an experiment using exposure to media reports in the case study will be discussed. Specifically, reaction to a standard voir dire question regarding pre-trial publicity is measured on a traditional yes/no categorical response and on a semantic differential between not guilty and guilty. The mass media theories of hypodermic needle, two-step flow of communication and uses and gratification theories are compared to contemporaneous judicial estimation of the effects of publicity on the rights of the criminally accused.

Keywords: Trial Publicity, Voir Dire, Sixth Amendment, Jury Prejudice, Crime Stories

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## INTRODUCTION

The Clint Eastwood directed feature film *American Sniper* set industry box office records in its opening days. Millions watched this dramatized biography about Navy SEAL Chris Kyle. In the last scene, Kyle is murdered by Eddie Ray Routh, another veteran suffering from posttraumatic stress disorder. Just days after the film won nine of the 27 academy awards for which it was nominated some of its audience served on the jury that convicted Routh. It was noted during the voir dire process. It was met with little controversy (Effron & Keneally, 2015).

What is of little controversy today would have been considered outrageous in American courts of the 19th and early 20th centuries. Minimal exposure to media crime stories would render potential jurors tainted and unable to serve. This strict approach is no longer practical in this age of ubiquitous interactive mass media.

To determine the presence of bias, a potential juror is asked a simple question requiring a categorical answer of “yes” or “no.” The question is whether jurors believe that they can set aside any estimations of guilt about the accused, disregard information learned from media sources and make a determination of guilty or not guilty based only upon evidence presented at trial.

Having a correct answer to this threshold question is paramount if the accused is to enjoy the Sixth Amendment right to a speedy and public trial, by an impartial jury. With life or liberty at stake, there must be a better judicial remedy than a simple yes or no response to the voir dire question posed above.

Judicial remedies such as change-of-venue, sequestration, jury admonitions, and gag orders were fashioned in a mass media era that included broadcast radio and television, an emerging cable television industry, and the traditional print media of newspapers and magazines.

Now these remedies are applied in a new media age that both extends the reach of traditional media and increasingly offers new media technologies with interactive capability. News reports now have extended shelf life, as they remain easily accessible on websites, indefinitely. User comments to these stories further increase discourse regarding the guilt or innocence of the criminally accused.

This article provides an historical overview of how judicial remedies for publicity have developed in within context of developments in media technology and theory. A case study will provide insight into a contemporary Free Press-Fair Trial contest in which traditional judicial remedies were sought. Finally, results of original research support a recommended change in traditional voir dire questions regarding bias. Specifically, measuring the response to voir dire responses on a semantic differential rather than a categorical yes or no response is discussed.

As noted in the literature review below, the efficacy of tradition remedies were controversial even before new media technologies developed.

## HISTORICAL CONTEXT OF FREE PRESS AND FAIR TRIAL

Early court decisions were more directly concerned with publicity during the actual trial. Verdicts were reversed and new trials ordered due to media exposure that would be considered minimal by today’s standards. Several 19th century decisions indicate an assumption that prejudicial media accounts contaminated jurors to the extent that they could no longer be impartial. An 1843 New Hampshire court expresses this assumption in one opinion by describing such a juror: “He will be unfitted to do justice to the parties, whether he derive his

impressions from reading the newspapers, from common report, from casual conversations with his neighbors, or from hearing witnesses testify in a court of justice” (*State v. Webster*, 1983). Media estimations of guilt were deemed to compromise juror impartiality.

An 1888 Pennsylvania court reversed a jury’s guilty verdict because they had read a newspaper article stating: “We hope that strict justice will be accorded him, and that, if innocent, which few believe, he may be able to prove it, and thus save his neck from the gallows” (*Commonwealth v. Johnson*, 1888). An 1894 California court reversed a verdict because the jury had read a newspaper article containing facts that had been declared inadmissible as evidence during the trial (*People v. Stokes*, 1894).

These early cases presumed that prejudicial publicity automatically impaired jurors’ ability to render judgment solely upon the evidence presented in court. This view was consistent with the then-prevailing mass communication theory known as the “hypodermic needle” theory. This theory hypothesized that exposure to media resulted in immediate, direct and powerful effects on audiences. Postulated without empirical research, the theory was based upon estimations of “instinctual behavior” (Lamb, 2013).

Contemporary culture may deem the hypodermic needle theory to be naive. It may have seemed more plausible in an era when Joseph Goebbels so effectively used media for Nazi propaganda and Orson Wells’ fictitious radio broadcast “War of the Worlds” convinced many that an alien invasion was underway.

As illustrated in the cases mentioned above, early courts demonstrated a like-minded view of media effects (Black, 1996). The hypodermic needle theory was consistent with the contemporary view of the effects of trial publicity.

The 1935 sensational trial of Bruno Hauptmann for the kidnapping and murder of Charles Lindbergh’s infant child was made more sensational by attendant broadcast media (“Famous American Trials,” n.d.). The circus-like atmosphere of this trial precipitated the American Bar Association’s Canon 35 of its Judicial Ethics, which advocated individual judges have the right to bar cameras and radio broadcasting from their courtrooms (Spann, 1978).

At first, courts were reluctant to allow media technology in the courtroom. Courts began to relax restrictions as broadcast technology became smaller and less obtrusive. Now televised court action is commonplace. News reports and discussion of trials has become a staple of popular media culture (Mertz, n.d.).

It is both counter-intuitive and practical that modern courts are not so absolute in their estimations of the tainting effects of prejudicial publicity. It is counter-intuitive due to the immense growth of media. It would seem that with the advent of instantaneous, pervasive and continuous news coverage that concern for juror impartiality would increase proportionately. Yet, these very aspects of modern media diminish the efficacy of change of venue remedies. For example, there is not a jurisdiction in this country that did not have extensive media coverage of courtroom action in the cases involving O. J. Simpson, Michael Jackson, or Casey Anthony.

Televised coverage of high-profile cases such as these resulted in precedent-setting U.S. Supreme Court opinions in the 1960s. Extensive media coverage frustrated courts’ abilities to seat impartial jurors. The “strict liability” nature of automatic disqualification due to media exposure that had been the standard was now unworkable. A paradigm shift was signaled by the United States Supreme Court in the 1961 opinion, *Irvin v. Dowd* (1961). Acknowledging the ubiquity of modern media, the court stated:

In these days of swift, widespread, and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any

of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. (*Irvin v. Dowd*, 1961, p. 81)

With this new paradigm, a new presumption exists. It is now presumed that some jurors, even jurors with preconceived notions about guilt, are able to disregard those opinions and any information previously learned about the case and then make a determination of guilt or innocence based solely upon evidence presented at trial.

The five-to-four decision in *Irvin* accommodated the explosive growth of mass media in the United States. This growth was evident with well-established television and radio networks, and instantaneous transmittal of information through the news wires such as Reuters and the Associated Press.

The progeny of *Irvin* provides contours to this new paradigm. Two years later the court qualified the *Irvin* standard for juror impartiality by describing the types of media coverage most likely to do harm to Sixth Amendment rights.

In the 1963 opinion, *Rideau v. Louisiana*, the Supreme Court reversed a murder conviction when pretrial publicity (PTP) took the form of a televised confession. A filmed jailhouse interview conducted by a sheriff and attended by two deputies was televised three times to tens of thousands of people in the Louisiana parish where Rideau's trial was conducted. The court presumed prejudice due to PTP and did not otherwise examine the lower court record.

Two years later in *Estes v. Texas* (1965), the Supreme Court indicated that prejudice must be shown (actual prejudice) unless it may be clearly implied in a given case from the totality of the circumstances (presumed prejudice). *Estes* formulated a "totality of the circumstances" test, which articulated those factors that must be considered (*Irvin v. Dowd*, 1961, p. 544). Those factors include the publication of inadmissible evidence, the community pattern of thought, media coverage of an alleged confession, and whether there is a "circus-like" atmosphere that is disruptive to the defendant's ability to attend to his defense (*Irvin v. Dowd*, 1961, p. 545).

Actual prejudice is that which is established through survey methods and voir dire. It is the admission by potential jurors of a firmly held belief that the defendant is guilty and that the belief cannot be set aside to deliberate solely upon evidence presented at trial. Proof of actual prejudice is presented to the court as factual information (*Irvin v. Dowd*, 1961, p. 545).

Supreme Court decisions of the 1960s were consistent with a newer mass media theory that had largely debunked the hypodermic needle theory. Researcher, Paul Lazarsfeld advanced the two-step model of communication based upon empirical evidence regarding media exposure and opinions regarding attitudes formed during and about the 1940 presidential election.

This model postulates that opinion leaders (in this context, judges) determine how media messages are regarded ("Two Step Flow Theory," n.d.). Lazarsfeld found that opinion leaders are more important to the formation of opinion than the media message itself. By the 1960s, his two-step model of communication was largely adopted by public opinion researchers (*Irvin v. Dowd*, 1961). Again, the courts seemed to be like-minded as jury admonitions from the bench were regarded as mitigating prejudicial publicity.

Beyond the prejudicial aspects of publicity, the Supreme Court emphasized the need to constrain media in order to protect the judicial process itself. This signal came in the 1966 opinion of the well-known case *Sheppard v. Maxwell*.

The popular motion picture *The Fugitive* is largely based upon *Sheppard v. Maxwell*. The film portrays Sheppard (played by actor Harrison Ford) as fleeing law enforcement while attempting to find his wife's true killer. To the student of media and law, the courtroom drama may prove interesting and instructional.

Sheppard was convicted of second-degree murder after his wife was bludgeoned to death in their Cleveland, Ohio home. He was not charged with the crime until a month after his wife's death. During that time he endured continual allegations of his guilt by Ohio media with such headlines as, "Getting away with murder," and "Why isn't Sam Sheppard in jail."

In order to accommodate media and spectator interest, the court was convened in a high school gymnasium to afford more room. The jurors were permitted access to all media reports. Those reports included juror names, addresses and pictures. To some degree, the jurors themselves became celebrities. Sheppard appealed his conviction to the U.S. Supreme Court that, in an eight-to-one decision ordered a new trial, citing violation of Sheppard's due process rights under the 14th Amendment.

Due process was denied, the Court stated, because of the "carnival atmosphere" of the trial as "newsmen practically overtook the courtroom, hounding most of the participants in the trial, especially Sheppard." Under such circumstances, Sheppard could not be expected to adequately attend to his defense.

The Supreme Court suggested the following remedies for trial courts: (a) rules should be established for courtroom use by reporters, (b) continuance until publicity abates, (c) sequestration, (d) change-of-venue, and (e) ordering of new trials (*Sheppard v. Maxwell*, 1966, p. 341).

Although the *Sheppard* court stopped short of suggesting actual prior restraint, courts may have interpreted the decision as license to do just that. Considering U.S. Supreme court rulings in *Rideau*, *Estes*, and *Sheppard*, a Nebraska judge issued an order restraining all members of the press from publishing accounts of an alleged murder confession by a criminal defendant.

This gag order was deemed an unconstitutional prior restraint as the Nebraska Press Association prevailed in an appeal to the U.S. Supreme Court. In the court's opinion, Justice Burger wrote, "A whole community cannot be restrained from discussing a subject intimately affecting life within it." Interestingly, the court did not deem gag orders as a whole unconstitutional. Rather, the court deemed that prior restraint was not appropriate in the case-at-bar.

### **Scholarly Research About Prejudicial Publicity**

The study of the effects of PTP upon jurors is cross-disciplinary. Researchers within the disciplines of law, psychology, sociology, communications, and journalism have published on this topic. The methodologies used in this research are consistent among the social science disciplines. Typically, participants are led to believe they are taking part in research that involves some other subject than PTP. Participants are exposed to extensive levels of prejudicial publicity, moderate levels of PTP or no publicity at all. Participants who later indicate they suspected a study involving jury bias are dismissed, along with their data. Voir dire is conducted. Then, a mock trial is conducted through either videotapes of actual trials or courtroom reenactments of actual trials.

Various studies examined the effects of PTP on jury deliberations, the types of media coverage that are most prejudicial, and the efficacy of judicial remedies. First, a discussion of PTP on jury deliberations is warranted.

Mock jurors who have been exposed to PTP consistently return higher guilty verdicts than those who have not. This finding holds true among jurors who indicated the absence of firmly held beliefs about the defendant's guilt and that they would be able to make their deliberations based solely upon the evidence presented at trial (Shahani, 2005). That is, they passed voir-dire examination aimed at detecting prejudice.

Post-trial analysis of juror deliberations revealed that those jurors exposed to PTP often confused evidence presented in court with information learned from PTP (Ruva, McEvoy, & Bryant, 2006). PTP that originates from official or scientific sources particularly influences jury deliberations (Curtner, 2005). In earlier generations, this confusion of evidence-at-trial and previously reported facts may have been mitigated by a continuance. Now news stories persist on websites, so the mitigation provided by a continuance may be marginalized.

Post-trial analysis of mock juror deliberations indicated that emotionally charged PTP significantly increases guilty verdicts, particularly when a child victim is involved (Jones, 1991). Moreover, the mitigating effect of a continuance is absent when prejudicial PTP is emotionally charged. It is not necessary that the news coverage amplify the emotional context of the story. The subject matter itself may be inherently emotional, such as the rape, murder, and crimes involving child victims.

Finally, social science research identifies certain types of cases to be "high-profile" in that they typically involve prejudicial PTP. Those types of cases are those with sexual or sordid facts that appeal to voyeuristic tendencies, where the crime is particularly heinous, and those in which the defendants are public figures (Morris, 2003).

In 1973, researchers Hoiberg and Stires tested the effects of different kinds of PTP on verdicts rendered by jurors in simulated trials. Heinous PTP was manipulated by varying the degree to which case descriptions contained lurid details of rape and murder.

PTP varied in the extent to which a defendant was implicated as perpetrator of the crime. It was found that for female participants all forms of PTP increased the likelihood of a guilty verdict (Ruva et al., 2006). Further research done by Sue, Smith, and Gilbert in 1974 found that PTP exerted a strong influence on verdicts and strength-of-case ratings by females. This data further suggests that bench admonitions to disregard PTP had no effect on jurors' verdicts, sentence recommendations, or ratings of the strength of the prosecution or defense's case (Curtner, 2005).

These studies, and others, point to the conclusion that exposure to any form of PTP can influence the outcome of a case, as it affects juror decision-making. Even PTP not related to the specific case a jury is dealing with has been shown to affect trial outcomes. This "general" PTP has indeed often been shown to affect jurors' decision-making in completely unrelated cases (Jones, 1991).

The social science research discussed above was conducted in the age of analogue media. Now media is available on digital platforms that extend their reach as they simultaneously create an archive of publicity easily accessible by any juror with a web browser. Daily newscasts are supplanted by continual news feeds in real time. The case study below illustrates contemporary media covering a heinous crime.

**CASE STUDY: THE COMMONWEALTH OF KENTUCKY V. CECIL NEW**

The following case study involves the types of deleterious publicity articulated in the *Rideau* opinion. An investigation regarding presumptive prejudice was conducted to support a motion for change-of-venue.

During the summer of 2007 in Louisville, Kentucky, 4-year-old Cesar Ivan Aguilar Cano was kidnapped, raped, and murdered. Arousing the passions of the community, details about the victim, the accused, and evidence were widely reported upon by Louisville media. Television reporting was especially prominent and sensational. Coverage began on June 29th, when the child's disappearance was reported as breaking news.

Search efforts, Ivan's photo, and police investigations were widely reported along with urgent appeals to anyone with information about where the child might be. Urgency turned to outrage on July 7th as media reported that Ivan's mostly nude, partially decomposed body was found in a garbage truck.

The search for the child became a search for his killer. Media attention and public consumption of it soared. The public had a need to know. The media had a right to report. A murdering pedophile was at large.

On July 10th, Louisville media reported that a registered sex offender, Cecil New, II, lived in close proximity to Ivan Cano. The news account described his previous conviction stemming from the sodomy of his niece and nephew, both under age 12. Although, Cecil New had not been arrested, indicted, or even described as a "person of interest" by law enforcement, a contest between First and Sixth Amendments began.

From the outset, media coverage regarding Cecil New included evidence that would be inadmissible in court. Eventually, it would include an alleged confession and shape public opinion. Even though this sensational, tabloid-style of reporting was fully protected by the First Amendment, conducting a fair trial became problematic due to the abundance of PTP.

PTP refers to any trial-related information that is featured prominently in the news. In the *New* case, as in *Sheppard*, PTP was adversarial to the defendant before he was even charged with the crime. As in *Rideau*, broadcast reports of an alleged confession were made. As in *Sheppard*, inadmissible evidence was widely reported. Because of this and other abundant examples of excessive PTP, in the months prior to trial the defense team moved for a change of venue. This case study of *The Commonwealth of Kentucky v. Cecil New* explores how the legal principals outlined above were applied in a highly publicized murder prosecution.

The trial judge restricted the defense from discovering prejudice through opinion polling. Thus, proving actual malice was denied. This decision may have been influenced by *Jacobs v. Commonwealth* (1997), Kentucky Supreme Court decision wherein a jury verdict of murder was reversed and the case was remanded with an order for change-of-venue.

In this Knott County, Kentucky case, media solicited and reported public outrage about an overturned conviction of the defendant in a similar murder 20 years prior. Opinions regarding Jacobs' guilt and appropriate punishment "permeated the media." Jacobs successfully assigned error to the trial judge as the court acknowledged evidence of actual malice in the trial record:

The public opinion survey/poll which was filed with the record indicated that in 100 calls, 98 persons had read or heard about the crime. Eighty-nine thus polled were aware of appellant's name; 73 knew that he had been in prison previously, and 60 were aware of that charge. Ninety-three persons had heard both radio and television stories, some up to at least 100 such reports. Eighty-five considered Jacobs guilty, while 15 did not respond

or stated they did not know. Sixty-five thought Jacobs would receive a fair trial in Knott County. (*Jacobs v. Commonwealth*, 1997)

The trial court record further indicated that of 38 jurors accepted by the court, 19 held the belief that Jacobs was guilty. Of those 19, four were impaneled to decide the case. As in the *Jacobs* court, the trial judge in the *New* court considered remedy statutorily provided in Kentucky Rev. Stat. Ann. (2011):

When a criminal or penal action is pending in any Circuit Court, the judge thereof shall, upon the application of the defendant or of the state, order the trial to be held in some adjacent county to which there is no valid objection, if it appears that the defendant or the state cannot have a fair trial in the county where the prosecution is pending. If the judge is satisfied that a fair trial cannot be had in an adjacent county, he may order the trial to be had in the most convenient county in which a fair trial can be had. (§ 452.210)

The statute does not indicate what a judge should consider in making such determinations other than the duty to ensure a fair trial. Since the 1942 enactment of Kentucky Rev. Stat. § 452.210 (2008), the *Jacobs* opinion and U.S. Supreme opinions discussed above have provided criteria that must be considered when a judge rules on a change of venue request.

How to consider this totality of circumstances is entirely within the judge's discretion. Still, a judge's ruling on a change of venue motion may be vacated and remanded should an appeals court determine that there has been an abuse of discretion.

The issue is whether the court ruled without support of substantial evidence on the whole record and/or the ruling is arbitrary. Therefore, the court must rule on a change-of-venue based upon presented evidence and consider that evidence at their discretion.

In *Jacobs*, the Kentucky Supreme Court provided precedent wherein trial record evidence of actual prejudice was sufficient for a finding of judicial abuse of discretion. This may provide impetus for judges to preclude defense counsel from measuring actual prejudice that would enter the court record.

Judges may otherwise forbid measurements of actual prejudice for fear of "push-polling." *Push-polling* is a type of opinion research wherein questions suggest conclusions. In any event, the denial of measuring actual prejudice leaves only the assessment of presumed prejudice. In order to do that, the "totality of circumstances" articulated in *Estes* must be considered. Consideration of PTP in the *New* case is provided below.

Newscast recordings obtained from Media Library, Inc. of Louisville included every broadcast news story related to the *New* case. This data included audience measurements from the Nielsen Company for the Louisville Designated Market Area (DMA). The company has divided the United States into 210 television markets, or DMAs. The Louisville DMA is the nation's 49th largest. Nielsen ratings are the industry standard used to determine audience sizes of television programs. The Nielsen Company's sophisticated survey instruments are able to measure audiences within specific age groups and gender.

The Nielsen data used in this study included the number of viewers, age 18 and over, watching each news story on Louisville broadcast television stations. Nielsen population estimates for population counts in each DMA county were verified with U.S. Census reports. The DMA population of Jefferson County was calculated as a percentage of the Nielsen DMA.

Audience measurements provided here relates specifically to viewers in Jefferson County Kentucky who are age 18 and above; therefore, closely approximating the jury pool of Jefferson County.

Content considered is from the Louisville market broadcast television stations: WAVE (NBC), WDRB (Fox), WHAS (ABC), WLKY (CBS), and WBKI (CW Network). All broadcast news stories, data regarding the broadcast news stories, and correlating audience measurements were provided by Media Library, Inc. through the Louisville Metro Public Defender's office. The Louisville *Courier-Journal*, through the Louisville Public Defender's Office, provided newspaper stories, both print and online, with corresponding audience measurements.

Additionally, an assessment of online publicity was conducted in regard to the television stations' websites. Content analysis was performed to answer the research question of whether PTP has created presumed prejudice to the extent that a change of venue is warranted in the case of *Commonwealth v. Cecil New*.

The *Estes* and *Sheppard* opinions provide criteria to determine the existence of presumed prejudice brought about by PTP. Content were analyzed in terms of: (a) publication of inadmissible evidence, (b) a community pattern of thought, (c) media coverage of an alleged confession, and (d) the existence of environment disruptive to the defendant's ability to attend to his defense.

Each occurrence of one of the criteria listed above was counted as an "exposure" within that category. A total of 3,169 broadcast news stories (60 hours and 20 minutes), and 94 newspaper stories were examined and coded. The study included media content from June 2007 through July 8, 2010.

These stories included news items relating to the search for Ivan Cano, his funeral and various community events. Broadcast news stories totaled more than 60 hours, 20 minutes of screen-time. Individuals may see the same news report repeatedly. The cumulative audience was 7,710,116 viewers. This cumulative audience total is approximately 15 times the population of adults, age 18 and over, residing in Jefferson County. Although these numbers give some sense of the magnitude of PTP, a comparison within the context of advertising is illustrative.

One of the most known Nielsen audience measurements is the rating. Simply put, a rating point equals 1% of the market population. To provide context, consider the Nielsen ratings for Jefferson County residents, age 18 and over, for these contemporaneous high-profile events: Inauguration of President Obama, January 2009 (29.7%; Nielson, 2009) and 2010 NCAA Basketball Tournament (16.6%; Nielson, 2010). Simply put, 29.7% of Jefferson County households watched television coverage of the inauguration of President Obama and 16.6% watched the NCAA basketball tournament. The Nielsen Company identifies Louisville as the nation's largest local percentage audience in the United States for NCAA basketball (Nielson, 2010).

The ratings above are for significant media events. In comparison, the ratings for pretrial coverage in the case indicated extensive viewership. For example, the Nielson rating for coverage of New's arrest was 60. Nielson measurements for his arrest, reports of the death penalty sought, and discussion of admissibility of evidence garnered ratings of 60, 57.8, and 65.9, respectively. These news stories included an alleged confession of guilt and an alleged jailhouse confession.

Ultimately, the trial court denied New's motion for a change of venue after hearing evidence supporting a contention of presumed prejudice. In the final analysis, all a researcher can provide is an accounting of the type and pervasiveness of news reporting. Proving what potential jurors actually think is a conclusion that can be suggested, but not proven unless opinion polling is permitted. On the eve of jury selection, New entered an unconditional guilty plea.

Still, this case is informative as it precipitated a concurrent legal action between a Louisville newspaper and the trial court judge. To protect his Sixth Amendment Rights, New moved for the Discovery file to be sealed (*Commonwealth of Kentucky v. Cecil New II*, 2008). A trial court judge may seal that record if interests favoring non-disclosure outweigh access to judicial documents (*Roman Catholic Diocese of Lexington v. Noble*, 2002).

On February 6, 2008, the trial judge ordered the discovery file to be sealed, noting that the egregious nature and sensational details of the crime might further inflame the passions of the community; she also said she wished to preserve an unbiased jury pool, if possible (*Commonwealth of Kentucky v. Cecil New II*, 2008).

The trial court's order to seal court records necessarily resulted from the court finding that New successfully met the high burden of proof necessary to overcome the First Amendment rights of news media to report not only about the case at bar, but to scrutinize the judicial process as well.

The U.S. Supreme Court opined that the operation of the judicial system itself is a matter of public interest, "necessarily engaging the attention of news media" (*Landmark Communications v. Virginia*, 1978). In Kentucky, this right is accompanied by a requirement that before records can be sealed, the trial court must hold a hearing in which the judge should "consider the utility of other reasonable methods available to protect the rights of the [party] short of closure" (*The Lexington Herald-Leader, et al v. Hon. Henry Meigs*, 1983).

In the event that closure is warranted, it would seem that a question would immediately arise whether the entirety of the discovery file should be sealed, or only parts of it. The U.S. Supreme Court, in the case popularly known as "Press Enterprise II," described the limitations of denying public access to court records:

[T]he presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered. (*Press-Enterprise Co. v. Superior Court of California*, 1986)

In the case of the *Commonwealth of Kentucky v. Cecil New II* (2008), the entire discovery file was sealed.

An immediate result of the trial court's order to seal the discovery file was the filing of an original action in the Commonwealth of Kentucky Court of Appeals by the *Courier-Journal*, a Louisville, Kentucky newspaper. In this action, the *Courier-Journal* sought a writ of mandamus and/or prohibition in which the appeals court would order the discovery documents to be unsealed (*Courier-Journal, Inc. v. Hon. Judith McDonald-Burkman*, 2008).

In Kentucky, news media have the right to pursue the mandamus remedy in the appellate courts in those instances where trial courts have refused access to court proceedings (*Courier-Journal and Louisville Times et al v. Hon. Olga Peers*, 1988). Additionally, the U.S. Supreme Court indicated a presumption of access to judicial records and documents (*Nixon v. Warner Communications, Inc.*, 1978). After acknowledging these fundamental First Amendment principles, and again citing *Nixon v. Warner Communications* (1978), the Kentucky Court of Appeals indicated that this presumption is not absolute. That is, the presumption is rebuttable.

The Court of Appeals ultimately upheld the judge's order to seal the discovery file, acknowledging the need to preserve an unbiased jury pool outweighed the First Amendment rights of the media, particularly because the death penalty was involved. Moreover, the Appeals

Court agreed with the trial court's finding that there was no less restrictive alternative that would effectively preserve the defendant's right to an impartial jury.

Unfortunately, the trial court's victory was moot as one or more employees in the Jefferson County Clerk's office leaked the discovery information to local television station WAVE-TV. Soon, the leaked information was spread throughout the Louisville television and print media. The sensational discovery documents that the trial court judge feared would taint a jury pool were published continually for the three years leading up to trial.

Despite the events described above, the trial court was ready to proceed with jury selection. Had New not changed his plea, his trial would have occurred in a media environment not unlike *Sheppard* or *Estes*. The guarantee of his Sixth Amendment rights to an unbiased jury would have depended upon how potential jurors responded to a simple yes/no question regarding their ability to make a determination of guilty or not-guilty based solely upon evidence presented at trial.

### **Finding a Better Voir Dire Question: An Experiment With PTP**

The Supreme Court indicated in *Nebraska v. Free Speech Association* that the trial court over-reached by placing a gag order on all media. As happened in the New Case, the *Nebraska* court did find it permissible for the court to constrain counsel, the jury, and officers of the court. Accordingly, the *New* court constrained defense counsel from conducting public opinion research. Determining opinions of potential jurors ultimately falls within the plenary discretion of trial judges, as the determination of presumed prejudice has no threshold.

To that end, original research is warranted. The inquiry below was an effort to determine whether a threshold could be established wherein juror prejudice could be documented through voir dire.

Previous research, discussed above, presented subjects to PTP then asked whether they would find the defendant guilty or not guilty. This response does not measure how certain the respondent's certainty of that answer.

The experiment described here included both a categorical yes/no response and a 7-point Likert scale to measure estimations of innocence or guilt (1 = *not guilty*, 4 = *neutral*, 7 = *guilty*). In like manner, subjects were asked to rate their confidence in their ability to disregard publicity to which they had been exposed. Data were collected to answer the research question: "Is there a significant difference among all groups between their response to a common voir-dire question concerning opinions of guilt when expressed on a 7-point differential scale and a categorical 'yes' or 'no' response?"

The methodology was simple. Three sections of the same freshman-level course were presented with actual pretrial news reports regarding the defendant in the case study provided above. Three different news stories were selected to correspond to specific events during the pretrial coverage: the naming of a person of interest, expert-provided evidence, and an alleged confession. The selection of these particular events was precipitated by findings discussed in the literature review above. For each event, news stories from the same date were selected from the *Courier-Journal* newspaper, and a broadcast television station within the same market. From these news stories, this researcher developed a simple recitation of facts upon which the news stories were based.

Therefore, for each event described above, three factual accounts of the events, three newspaper accounts of the events, and three broadcast television accounts of the events formed a corpus of variables to be considered.

One group of participants ( $n = 24$ ) was presented with a factual account of a “person-of-interest” named in the murder investigation. They were then presented with a 7-point semantic differential wherein they were asked to estimate “guilty” or “not guilty” regarding the defendant. Subsequently, they were presented with a factual account of expert-provided evidence and an alleged confession and asked to estimate guilty or not guilty using the same 7-point semantic differential after each exposure.

Afterward, they were asked to rank each story, using the semantic differential, as to how much the story suggested guilty or not guilty. Finally, they were presented with a common inquiry of potential jurors calculated to determine whether a firmly held opinion would disqualify that person from jury duty.

They were then asked to respond to this question on the 7-point semantic differential and again with a categorical yes/no response. In like manner, a second group of participants ( $n = 14$ ) were presented accounts of these events in the form of journalistic reports from the *Louisville Courier-Journal* newspaper and a third group of participants ( $n = 27$ ) were presented accounts of these events through a screening of news reports from broadcast television stations. The broadcast stories were presented once without replay. Additionally, all respondents ( $N = 66$ ) were asked to identify themselves as male or female.

The experiment suggests interesting findings. In all groups, the most reported categorical response was *yes*. That is, subjects responded that if called upon to serve on a jury they could make a determination of innocence or guilt based only on evidence presented at trial. The same respondents, when presented with same question and asked to indicate their response on a Likert scale most reported a selection of 3. This indicates the weakest confidence their objectivity. Also, most respondents indicated they thought the defendant to be guilty.

## DISCUSSION

Sixth Amendment rights of defendants and the public’s right to know are increasingly frustrated in this new media age. Remedies for PTP were fashioned before the Internet or interactive media were contemplated. The efficacies of these remedies have been debated for decades. Now media reports are preserved on websites and remain accessible to potential jurors wherever venue may be changed and whenever a continuance is over. Although jurors may be admonished to avoid media reports of a trial in progress, the ability to learn about witnesses, experts or non-admitted evidence is as simple as using a smart phone. This same technology provides the means for those other than traditional media to create PTP. Use of new media technologies such as Twitter, Storify, and Instagram make news reporting instantaneous and possible for nearly everyone.

The case study presented above illustrates the limitations of judicial remedies for PTP. Except for the expensive remedy of sequestration and the extreme proposition of gag orders, the traditional remedies of change-of-venue, change of veniremen, and continuance are eviscerated by new media technology.

The accommodation provided in *Estes*, wherein the Supreme Court conceded that impaneling a jury without some impressions of the case-at-bar is an impossible standard, stretched the estimations of jurors’ ability to remain unbiased. That accommodation may now be

stretched too thin. The *Sheppard* court criticized an environment “permeated by media” (*Sheppard v. Maxwell*, 1966). Now, that media environment takes the form of trials televised live with color commentary provided by experts. The Florida trial of Casey Anthony illustrates this new media environment. Perhaps not as widely covered as the O. J. Simpson murder trial, the Anthony case included a social media component that did not exist at the time of the O. J. Simpson trial.

Accordingly, viewers of this trial were able to comment in real time to the televised court action. Confidence in the judicial system is questioned as television personality Nancy Grace commented after the not-guilty verdict, “As the defense sits by and has their champagne toast after that not-guilty verdict, somewhere out there, the devil is dancing tonight.”

Interestingly, a parallel seems to exist between mass media theory and contests between the First and Sixth Amendments. The hypodermic needle theory mirrored the then contemporaneous practice of disqualifying from jury duty anyone who had been exposed to media reports. Later, the two-step flow of communication rejected the hypodermic needle theory while courts considered that exposure to media itself did not disqualify one from jury duty. Opinion leaders control the acceptance of media messages. That is, a respected person’s attitude about a media message means more than the message itself. With that, admonitions to juries should work so long as juror opinions are not too closely held.

With this new media age, a comparison to more current media theory is invited. Uses and gratification theory has its origins in the 1940s research of Herzog. Her inquiry centered upon why people chose certain types of media. This research was developed and commented upon by other researchers such as Maslow, Laswell, and Katz. Simply stated, uses and gratification theory focuses on the consumer of media rather than media itself. People may use media to be entertained, socialized, informed, or simply diverted. According to the theory, the large audiences that attended coverage of the Casey Anthony trial may not have been motivated by an interest in the judicial process. Rather, this trial, as many others, may have been the most dramatic of reality television shows. Thus, the tension may not be between the Sixth Amendment rights of the defendant and the public rights to be informed. It may involve the entertainment value of legal contests.

A practical solution to the Free Press-Fair Trial debate has been elusive. As demonstrated in the case law, case study, and survey conducted above it would seem that the Sixth Amendment is losing ground.

### **Suggestions for Improvements in Judicial Remedy**

First, trial courts must allow actual prejudice to be measured. Responding to motions for change-of-venue based on evidence of presumed prejudice falls short of the court’s duty. A finding of presumed prejudice falls entirely within the trial courts discretion.

Well-developed instruments to assess opinion are widely accepted and used in the marketplace. Potential jurors should be presented with a battery of questions to determine whether they are biased, and to what degree. Using a survey instrument with Likert-type scales or semantic differential would better reveal juror attitude than their own self-reporting with a categorical yes or no.

The court should consider how definite the answer is. It may be a strong, definite response or a more tentative one. Either way, the categorical answer is counted as *yes*. A simple

solution would be to estimate juror opinion using the same methods used to measure public opinion. Rather than requiring a categorical yes or no, the response could be qualified.

Survey instruments provide accurate means to measure public opinion. Pollsters ask subjects whether they “strongly disagree, disagree, neutral, agree, or strongly agree,” or some variation of that wording. Multiple questions yield increased reliability. Opinion research can offer a more nuanced measurement of opinion than a simple categorical response of yes or no. It is time for the judiciary to once again catch up with an increased understanding of media offered by academic scholarship.

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